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August 05, 2005

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



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Signed and Filed: August 04, 2005

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THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re) Case No: 01-30127 TC
NORTHPOINT COMMUNICATIONS) (Jointly Administered with
GROUP, INC., NORTHPOINT) #01-30125, #01-30126, and
COMMUNICATIONS, INC.,) #01-30128)
NORTHPOINT COMMUNICATIONS OF)
VIRGINIA, INC., NORTHPOINT)
INTERNATIONAL, INC.,) Chapter 7
)
Debtors.)
)
)
DINA GAN, TANJA WARNER, TRESSA JONES) Adv. Proc. No. 01-3107 TC
ERIC JAMES and BRANDON LANE,)
individually and on behalf of others)
similarly situated,) Date: July 29, 2005
Plaintiffs,) Time: 9:30 a.m.
Ctrm: Hon. Thomas E. Carlson
vs.) 235 Pine Street
E. LYNN SCHOENMANN, Trustee of) San Francisco, CA
Northpoint Communications, Inc.,)
Defendant.)
)

MEMORANDUM RE MOTION FOR LEAVE TO AMEND ANSWER

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1 On July 29, 2005, this court held a hearing regarding the
2 motion of Defendant, chapter 11 trustee E. Lynn Schoenmann
3 (Trustee), to amend her answer in this action to add two
4 affirmative defenses. Dennis D. Davis appeared for Trustee. David
5 A. Lowe and Christopher D. Kuhner appeared for Plaintiff. Upon due
6 consideration, and for the reasons stated below, the motion is
7 denied regarding the "faltering company" defense, and granted
8 regarding the "good faith" exception.

9 **Faltering Company Exception**

10 Trustee's request to amend her answer to assert the "faltering
11 company" exception is denied on the basis that the amendment would
12 be futile. To invoke that exception, the employer must (1) be
13 actively seeking financing, (2) that it has a realistic opportunity
14 to obtain, (3) that would enable the employer to postpone a
15 shutdown for a reasonable period of time, and (4) that the employer
16 could not obtain if WARN Act notice was provided to the employees.
17 20 C.F.R. § 639.9(a).

18 Trustee cannot establish the third requirement of the
19 exception - that the financing sought would postpone the shutdown
20 for a reasonable period of time. Debtor filed its motion to obtain
21 financing on January 17, 2001. The motion indicates that even with
22 the desired financing, Debtor could not operate beyond March 31,
23 2001, and that Debtor intended not to operate indefinitely, but to
24 close a sale of its assets by the end of March. The financing thus
25 would have allowed Debtor to operate for only 73 days, little more
26 than the 60-day WARN Act notice period, at which time Debtor would
27 definitely cease operations. Although Debtor hoped that a buyer
28 would hire Debtor's employees, it had no reasonable basis to expect

MEMORANDUM RE MOTION FOR LEAVE TO AMEND ANSWER

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1 that would happen. As of 60 days before its expected shutdown,
2 Debtor had not found a buyer, it was merely pursuing a process of
3 seeking a buyer. Moreover, Debtor's proposed sales procedures did
4 not specify that the purchaser was to retain Debtor's employees or
5 to be responsible for providing WARN Act notice to those employees.
6 Thus, this case is not at all like Burnsides v. MJ Optical, Inc.,
7 128 F.3d 700, 703 (8th Cir. 1997), in which the purchaser had agreed
8 to retain the acquired company's employees until just before the
9 sale closed. In sum, Debtor knew it would shut down approximately
10 73 days after it obtained the financing, and had no demonstrable
11 basis to expect that a purchaser would retain its employees
12 afterward.

13 **Good Faith Exception**

14 Trustee's request to amend her answer to assert the "good
15 faith" exception is granted. Leave to amend should be granted,
16 because the case has not yet been set for trial, discovery is not
17 closed, the defense does not involve a wholly new set of facts, and
18 the amendment does not appear to be futile.

19 ****END OF MEMORANDUM****

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MEMORANDUM RE MOTION FOR LEAVE TO AMEND ANSWER

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